

REGULAR

NUMBER: 259

TITLE: AN ORDINANCE OF THE CITY OF MILPITAS ADDING CHAPTER 11 TO TITLE X OF THE MILPITAS MUNICIPAL CODE ENTITLED "REGULATION OF NEWS RACKS"

HISTORY: This ordinance was introduced (first reading) at a meeting of the City Council of the City of Milpitas on March, 4, 2003, upon motion by Councilmember Polanski, was reintroduced on March 18, 2003, upon motion by Councilmember Polanski and finally adopted (second reading) at a meeting of said Council on April 1, 2003, upon motion by Councilmember _____. Said ordinance was duly passed and ordered published in accordance with the law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Gail Blalock, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Steven T. Mattas, City Attorney

ORDAINING CLAUSE:

THE CITY COUNCIL OF THE CITY OF MILPITAS DOES ORDAIN AS FOLLOWS:

Section 1: A new Chapter 11 is added to Title X to read as follows:

“Chapter 11 Regulation of News Racks.

SECTION X-11-1.01 Findings and purpose.

The public sidewalks and pedestrian walkways are important thoroughfares for all, including residents and visitors with physical challenges and disabilities. There is a substantial governmental interest in promoting the public health, safety and welfare by ensuring that persons may use the public streets and sidewalks without unreasonable interference. Encroachments into the sidewalk and pedestrian thoroughfares are permitted on a limited basis by permit. News racks historically have been placed in public areas and have been allowed to encroach subject to certain clearly defined limitations. The proliferation of news racks can be unsightly and, if placed improperly, can unreasonably interfere with pedestrian traffic, particularly as those news racks may conflict with the movement of disabled pedestrians. It is, therefore, important and necessary to regulate the placement of news racks and encroachments in general to preserve free access while allowing the greatest opportunity for dissemination of printed material through these vending machines. In particular, the regulation of the placement of news racks near and around City buildings, parks, and other facilities is necessary given the importance of preserving and enhancing public access and enjoyment of these facilities.

It is intended that the provisions of this ordinance shall be consistent with the requirements of the Americans with Disabilities Act (ADA) and related laws and that the owner of each news rack comply with its provisions. The regulation of the sale or free distribution of newspapers and other publications dispensed from news racks as set forth in this article provides the least intrusive and burdensome means for ensuring the purposes stated in this chapter are carried out while still providing ample opportunities for the distribution of news, opinion and free speech. Given the limited space available and the increasing congestion throughout the community, the city has a substantial interest in devising a systematic approach to news rack placement to ensure a fair and equitable distribution of publications.

This Chapter does not regulate the placement of news racks on private property or property owned by any government jurisdiction other than the City of Milpitas.

SECTION X-11-2.01 Definitions.

- a. "Abandoned news rack" shall mean any news rack which remains empty for twenty-one (21) business days, except that a news rack remaining empty due to a labor strike or any temporary and extraordinary interruption of distribution or publication by the newspaper or other publications sold or distributed from that news rack shall not be deemed abandoned.
- b. "Director" shall mean the city official designated by the City Manager as administrator of this Chapter.
- c. "Freestanding news rack" is any news rack, which is not a modular news rack.
- d. "Harmful matter" shall be as defined in Section 313 of the California Penal Code.
- e. "Modular news rack" shall mean an assembly of two or more attached news racks which is of a type, design or model permitted by this article and which contains self-service or coin-operated boxes, containers, storage units or other dispensers installed, used or maintained for the display and sale or the distribution without charge of newspapers, news periodicals or other news publications.

- f. "News rack" shall mean any self-service or coin-operated box, container, storage unit or other dispenser installed, used or maintained for the display and sale or distribution without charge of newspapers, periodicals or other publications. "News rack" shall include any coin-operated or slug-operated vending machine or mechanically or electronically controlled vending machine.
- g. "Parkway" shall mean the area between the edge of the roadway and the adjacent street right-of-way line, excluding that area occupied by the sidewalks. Parkway shall also include any area within a roadway, which is not open to vehicular travel.
- h. "Public Facilities" shall mean those facilities owned and operated, and the public right-of-way immediately adjacent to such facilities, by the City as designated on a list to be maintained by the City Manager for purposes of this Chapter.
- i. "Sidewalk" shall mean any portion of a street between the curbline and the adjacent street right-of-way line intended for the use of pedestrians, excluding parkways and improved with a nonporous paving material.
- j. "Specified anatomical areas" means:
 - 1. Less than completely and opaquely covered human genitals, pubic region, buttocks, perineum, anal region, or female breast at or below the areola thereof;
 - 2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.
- k. "Specified sexual activities" means:
 - 1. Human genitals in a state of sexual stimulation or arousal;
 - 2. Acts of human masturbation, sexual intercourse or sodomy; or
 - 3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

SECTION X-11-3.01 Permit required for placement of news racks on or adjacent to Public Facilities.

- a. Any person wishing to use a Public Facility for the distribution of newspapers, periodicals, or other literature shall obtain a permit from the director. The application for permit shall be made on such forms as may be provided by the Director.
- b. The provisions of this article shall be the exclusive requirements for news rack encroachments onto public property and rights-of-way adjacent to Public Facilities in the city and shall preempt any other conflicting provisions of this code. In implementing or enforcing this article, the director shall not consider the content or viewpoint of the material to be distributed through the news racks.
- c. An applicant may request that the City waive the fee for processing its application.
- d. The news rack permit application shall state the name, address, telephone and fax number of those responsible for installation, use and maintenance of the news rack. It shall specify which Public Facility is proposed for installation of the news rack. The application must also indicate the type of rack and if it is not a type approved in Section X-11-4.01, describe with particularity its appearance, by photo and/or drawing if necessary.
- e. Upon receipt of a complete application, a news rack permit shall be issued within thirty (30) working days if the type of news rack and location(s) proposed meet the standards set forth in this

Chapter. The director shall notify the applicant in writing of the decision on the application, including a decision on whether the application is complete, within fifteen (15) days. If an application is denied, in whole or in part, or is determined to be incomplete, the notice to the applicant shall state the reason(s) for the denial, or the basis for finding the application incomplete. The applicant may appeal the decision by filing a written appeal with the city manager within fifteen (15) days of receipt of the decision. Upon receipt of an appeal, the city manager's office shall, within fifteen (15) business days, notify the applicant of the date, time and place of the hearing. The city manager or designee shall issue his/her decision in writing no later than fifteen (15) business days after the hearing. The decision of the city manager or designee shall be final.

- f. The City Manager or designee shall inform any person challenging a final decision of the right to a prompt judicial review pursuant to Section 1094.8 of the California Code of Civil Procedure and that any judicial action appealing the final decision shall be commenced within thirty (30) calendar days of the date of the service of the decision
- g. An applicant securing a news rack permit may install and maintain additional news racks in the same location by securing an amendment to the permit originally granted to that applicant. The rules and procedures of this section shall also apply to the review and approval of any such amendment.
- h. News rack permits are valid for one year from the date of issuance and shall be automatically renewed for one (1) year on each anniversary date unless a notice of non-renewal is sent to the permittee by the director thirty (30) days prior to the expiration date. The City has the prerogative to terminate a permit earlier if the rack conflicts with a capital improvement project, changes to nearby public or private property make it necessary to relocate the rack, or the rack is no longer in compliance with this article.

SECTION X-11-4.01 Design of news racks for placement on or adjacent to Public Facilities.

- a. Only modular-style news racks shall be allowed on or adjacent to Public Facilities. No freestanding news racks shall be allowed.
- b. Modular-style news racks shall be painted black and be one of the following types: K-49-16, K-100 (as manufactured by "Sho-Rack") or KJ50/KJ55F (as manufactured by "K-Jack") or M-30/M-33 (as manufactured by "National News Vend") or a similar style as may be approved by the director.
- c. The City of Milpitas expects all news rack users to work cooperatively. A news rack owner or operator that installs or maintains a modular rack is expected to share spaces with other publications, so that the public will have the maximum possible choice of news publications, and may recover a proportional share of the cost of the rack from other publications displayed in the rack. If there are more publications requesting compartments than available compartments.
- d. News racks shall not exceed fifty (50) inches in height, including pedestal, measured from the ground to the top of the surface of the news rack, and not more than two (2) feet deep and not more than thirty (30) inches wide.
- e. News racks do not require any further discretionary approval.
- f. Racks may contain identification graphics covering up to twenty-five (25) percent of each side of the rack. On the door side of a news rack, the allowable graphic is either: (1) twenty-five (25) percent of area; or (2) a standard placard eleven (11) inches by sixteen (16) inches or similar size)

plus the name of the publication in letters one and one-half (1½) inches or less. Graphics and placards shall not promote or advertise any product, business or service, other than the publication dispensed from the news rack except when that product, business or service is being specifically promoted in the publication dispensed from the news rack.

SECTION X-11-4.02 Number of news racks permitted on or adjacent to Public Facilities.

- a. The director shall determine for each Public Facility the number of modular news racks that shall be allowed on or adjacent to each facility. The director shall specify whether the allowable modular news racks may consist of four compartments or six compartments.

SECTION X-11-4.03 Standards for installation of news racks.

- a. Any news rack that is located on or adjacent to a Public Facility shall be installed in conformance with this Chapter and with such additional standards as the director may specify for the particular Public Facility upon which the news rack will be located.

SECTION X-11-4.04. Restricted news rack locations.

- a. No person shall install, stock, use or maintain any news rack which projects onto, into or over any part of the roadway of any public right-of-way, street, or which rests, wholly or in part, upon, along or over any portion of a roadway.
- b. No person shall install, stock, use or maintain any news rack which, in whole or in part, rests upon, in or over any public sidewalk or parkway, when such installation, use or maintenance endangers the safety of persons or property or when such site or location is used for public facilities purposes, public transportation purposes or other governmental use, or when such news rack unreasonably interferes with or impedes the flow of pedestrian or vehicle traffic, including access for the disabled, bicycle access, the ingress into or egress from any residence, place of business or the use of poles, posts, traffic signs or signals, hydrants, postal service collection boxes or other objects permitted at or near said location.
- c. No news rack shall be placed, installed, used or maintained:
 - 1. Within five (5) feet of any marked crosswalk or within fifteen (15) feet of any unmarked crosswalk as measured from the curb return, or within five (5) feet of any wheelchair curb ramp not in a marked crosswalk.
 - 2. Within five (5) feet of any fire hydrant, fire call box, police call box or other emergency facility.
 - 3. Within five (5) feet of any driveway.
 - 4. Within five (5) feet of any bus bench.
 - 5. Within fifteen (15) feet ahead of, and five (5) feet to the rear of, any sign marking a designated bus stop, relative to the direction of bus travel. News racks placed seven (7) feet from the curb, measured perpendicular to the roadway, are exempt from this limitation.
 - 6. At any location where the clear space or sidewalk space for the passage of pedestrians is reduced to less than four (4) feet.
 - 7. In such a manner as to impede or interfere with the reasonable use of any building, the activity of any business or residence or the use of any commercial window display or sidewalk cafe.

SECTION X-11-4.05. Maintenance of news racks.

- a. Each news rack shall be maintained in a neat and clean condition and in good repair at all times. For example, without limitation, the news rack shall be reasonably free of dirt and grease; be reasonably free of chipped, faded, peeling or cracked paint; be reasonably free of rust and corrosion; have no broken or cracked plastic or glass parts; and have no broken structural parts.
- b. Each news rack which requires a deposit of money to obtain the publication shall be equipped with a coin-return mechanism to permit persons using the machine to secure a refund in the event they are unable to receive the publication. The coin-return mechanism shall be maintained in good working order.
- c. Each person maintaining a news rack under the terms of this article shall have his or her name, current address and telephone number (updated within fifteen (15) days of any changes) affixed to it in a place where such information will be readily visible and shall include such identification instructions on how to receive a refund in the event of a coin-return malfunction. The city-issued permit sticker shall be affixed to the rack near the door handle.
- d. Upon the removal of any news rack, the public right-of-way shall be returned to its original condition, including, but not limited to, the repair of any damage that may have been caused by the installation or use of the news rack.
- e. Abandoned news racks may be removed from the public right-of-way or public property by a city employee and may be disposed of if not claimed by the permit holder within thirty (30) days after the city has notified the owner in writing. Such notice shall state the code section violations, the length of time within which the violation must be cured, and the forum within which the owner may request a hearing to resolve the situation.

SECTION X-11-4.06. Abatement of violations.

- a. A news rack on public property or in the public right-of-way in violation of this Chapter may be removed by a designated city employee of the City of Milpitas if a violation of this Chapter exists and is not corrected after the city has notified the permit holder pursuant to this section.
- b. Before any news rack is removed by a city employee from public property or the public right-of-way, the owner shall be notified by a posting and mailing, where feasible, to the address for such party stated on the news rack permit and given fifteen (15) days to remedy the violation and/or contest removal. If no identification is shown on the news rack and no news rack permit has been obtained, posting of the notice on the news rack alone shall be sufficient. Both forms of notice shall state the place to request a hearing to contest removal of the news rack. The notice shall also indicate that if removed by the city, the news rack will be stored at the city's corporation yard for thirty (30) days and then disposed of if left unclaimed, without further notice.
- c. Any person notified under this section may submit a written request for a hearing before the director, which hearing shall be held not less than fifteen (15) business days after the request was made. The hearing shall be informal, but oral and written evidence may be offered by the owner, permittee and/or any interested party. Any action by the city with respect to the alleged violation shall be stayed pending the director's decision following the hearing, which decision shall be rendered no later than fifteen (15) business days after the hearing. The director may give oral notice of the decision at the close of the hearing, but shall give written notice as well of all decisions. The applicant may file a written appeal of the decision to the city manager within fifteen (15) days.

Upon receipt of an appeal, the city manager's office shall, within fifteen (15) business days, notify the applicant of the date, time and place of the hearing. The city manager or designee shall issue his/her decision in writing no later than fifteen (15) business days after the hearing. The decision of the city manager or designee shall be final.

- d. The city may remove a news rack from public property or the public right-of-way if:
 - 1. The person responsible for such news rack has neither requested a hearing before the director nor remedied the violation within fifteen (15) business days following the date of notice; or
 - 2. The person responsible for such news rack has failed to remedy the violation within fifteen (15) business days after receiving a copy of the written decision of the director that the news rack was installed or maintained in violation of this article following a hearing conducted pursuant to this section; or
 - 3. The news rack is an abandoned news rack.
- e. News racks removed or impounded by the City of Milpitas shall be stored in the city's corporation yard. News racks which are not claimed within thirty (30) days shall be deemed permanently abandoned and may be disposed of by city, so long as city has given notice to the permit holder as specified in Section X-11-4.06(b).
- f. The person responsible for such news racks shall pay an impound fee covering the actual costs to the city of transporting, storing and disposing of such news racks, as established by council resolution. Abatement hereunder is a nonexclusive remedy. The city may employ other remedies in law or equity to effect compliance.

SECTION X-11-4.07. Blinder racks required for news racks displaying adult material.

- a. News racks located in public places, other than public places from which minors are excluded, and public property and city rights-of-way, and which display harmful matter to the public view, shall be equipped with devices commonly known as blinder racks in front of the material so that the lower two-thirds of the material is not exposed to public view.
- b. News racks located in public places, other than public places from which minors are excluded, and public property and city rights-of-way, and which display to the public view material depicting or describing specified sexual activities, as defined in this article, or which contain material depicting or describing specified anatomical areas, as defined in this article, where such picture, or illustration, or statement has as its purpose or effect sexual arousal, gratification or affront, shall be equipped with blinder racks in front of the material so that the lower two-thirds of the material is not exposed to public view.

SECTION X-11-5.01 Amortization requirements.

- a. Every news rack subject to the requirements of Section 3.01 shall comply with said requirements no later than 180 days from the date of the adoption of this Chapter.
- b. Every news rack located on public property or in the public right-of-way shall comply with the requirements contained in Sections X-11-4.01 through X-11-4.07, inclusive not later than 180 days from the date of adoption of this Chapter."

Section 2. PUBLICATION AND EFFECTIVE DATE.

Pursuant to the provisions of Government Code Section 36933, a Summary of this Ordinance shall be prepared by the City Attorney. At least five (5) days prior to the Council meeting at which this Ordinance is scheduled to be adopted, the City Clerk shall (1) publish the Summary, and (2) post in the City Clerk's Office a certified copy of this Ordinance. Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall (1) publish the summary, and (2) post in the City Clerk's Office a certified copy of the full text of this Ordinance along with the names of those City Council members voting for and against this Ordinance or otherwise voting. .

Section 3. SEVERABILITY

In the event any section or portion of this ordinance shall be determined invalid or unconstitutional, such section or portion shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.